

**GUIDE TO
CASE MANAGEMENT AND BUDGETING
IN CAPITAL HABEAS CASES
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

EFFECTIVE FOR CASES FILED AFTER JULY 1, 2011

[ADDITIONS IN THE TEXT ARE UNDERSCORED]

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INTRODUCTION

1. This provides an overview of the case management and budgeting process for capital habeas corpus cases in the Fresno Division of the Eastern District of California. Updates of this Guide are available on the Court's website at www.caed.uscourts.gov, under Fresno, Attorney Info, Forms, Case Management and Budgeting in Capital Cases. The information contained within this Guide is of primary interest to attorneys appointed to represent capital habeas petitioners, but also is relevant to Deputy Attorneys General assigned to cases pending in the Fresno Division. The case management and budgeting process is intended to ensure continuing court supervision of capital habeas cases and to control costs by:
 - Dividing cases into four logical phases for which budgets can be developed;¹
 - Requiring Petitioner's counsel to submit to the Court a case management plan and budget for each phase of the case;
 - Using an automated budgeting program;
 - Conducting case management conferences to manage the proceedings and resolve budget issues; and
 - Establishing deadlines governing completion of the activities contemplated for each phase.

¹ The three-phase guide is being discontinued. Cases initiated into the three-phase procedure will be moved into four phases at an appropriate interval. Phase II under the three-phase procedure will become Phase III and Phase III under the three-phase procedure will become Phase IV. The three-phase attorney guide will remain posted on the Court's web site until the transition is complete.

2. The process described in this Guide applies to the first federal capital habeas corpus petition filed in a case. The process requires continuous judicial case management to conserve judicial resources by creating realistic expectations on the part of counsel, and by reducing time spent on contentious procedural issues. The judge assigned to an individual case may modify the process described herein.
3. The automated “Case Management Plan and Budget Forms” created by the Judicial Council of the Ninth Circuit are to be used by counsel for capital habeas petitioners appointed pursuant to the Criminal Justice Act (“CJA”) in preparing for each phase of the case. The phases are:

Phase I Appointment, Record Review, and Preliminary Investigation
Phase II Comprehensive Petition Preparation, Answer, and Traverse
Phase III Fact Development Discovery, and Motion for Evidentiary Hearing
Phase IV Pre-Evidentiary Hearing Discovery, Evidentiary Hearing, and Final Briefing
4. Automated forms require Microsoft Excel software. The automated forms provide activity categories designed to assist counsel in planning their work, developing a budget, keeping track of expended and remaining hours, and completing the CJA vouchers.
5. For assistance with the substantive law governing federal habeas corpus proceedings, counsel may refer to the Ninth Circuit Capital Punishment Handbook. The Handbook is located under “Publications” on the website for the Ninth Circuit’s Office of the Circuit Executive at www.ce9.uscourts.gov. Counsel also may consult with the California Habeas Corpus Resource Center and the Capital Habeas Unit of the Federal Defender for the Eastern District of California. Both agencies maintain brief banks and assist attorneys assigned to capital habeas cases. A substantial amount of consultation, however, will be considered work inherently necessary to practice and remain current in the area of federal habeas law, which is considered

part of overhead and not reimbursable. This follows from the Court's perspective that any work counsel may undertake to remain current in the area of federal habeas law, including review and analysis of recently decided cases, is non-reimbursable overhead.

COMMENCEMENT OF THE CASE

6. The federal capital habeas corpus process typically is initiated by Petitioner's requests for stay of execution, leave to proceed *in forma pauperis*, and appointment of counsel. Upon filing, the case is assigned to a district judge.
7. Following review of the initial pleadings, the Court will issue an order staying execution if necessary, evaluating Petitioner's request to proceed *in forma pauperis*, and addressing the appointment of counsel. The stay of execution issued pending appointment of counsel is authorized pursuant to Rule 191(g)(1) of the Local Rules for the Eastern District of California and 28 U.S.C. § 2251(a)(3). For appointment of counsel, the Court will refer the case to the Selection Board of the Eastern District of California for a recommendation.
8. While the Court often appoints two attorneys to a case due to the complex nature and restrictive time limits of capital habeas work, *see* 18 U.S.C. § 3599(d) appointment of two attorneys at the maximum hourly rate is not presumed. Justification for the appointment of two lawyers who truly function as co-counsel to one another will be required. According to the amended costs policy promulgated by the Ninth Circuit Judicial Council, the maximum rate of compensation for lead counsel, who have substantial experience and skill in federal capital habeas corpus proceedings, is \$178 per hour. The compensation rate for attorneys with significant, but less than substantial experience is \$163 per hour. All other lead counsel will be compensated at a rate between \$142 and \$158 per hour according to their experience and skill. Second counsel will be compensated at a rate between \$116 and \$142 per hour based on experience and skill.

Appointed counsel shall specify whether they are co-counsel or lead and second counsel and are directed to complete the Rate Justification Worksheet (Appendix A) for determination of the appropriate compensation rate.

9. The Court may issue an order scheduling a Case Management Conference (“CMC”) shortly after the appointment of counsel.

BUDGET PROCEDURES

10. Budgeting forms for each of the four phases may be viewed and downloaded from the Court’s website at www.caed.uscourts.gov, under Fresno, Attorney Info, Forms, CJA. The Ninth Circuit Judicial Council’s Amended CJA Capital Habeas Costs Policy (“Ninth Circuit Capital Habeas Costs Policy”) also is available at the same location on the Court’s website.
11. Automated procedures and instructions are as follows:
 - a. The automated budget and voucher processing file for the current phase will be sent to counsel by the District Court staff attorney assigned to the case.
 - b. Counsel shall complete the proposed budget for the current phase of the litigation and e-mail the completed budget to the Court for filing under seal, as indicated in Local Rule 141(e)(2). A copy of the proposed budget also shall be sent to the District Court staff attorney assigned to the case. After the budget is approved, the updated Excel file will be e-mailed back to counsel for voucher processing.
 - c. Counsel shall fill in the timesheet portion of the automated file as work is performed, and the expense sheet portion as expenses are incurred or bills are received. Services performed by employees of appointed counsel may listed as an expense.
 - d. At the end of the month, counsel will complete the voucher by electronically signing it and dating it. The electronic copy of the entire Excel file shall be sent via e-mail to the

Court (that is, to the assigned staff attorney). All attached receipts or invoices should be scanned and submitted by e-mail with the Excel file or transmitted separately by facsimile.

- e. Unless counsel have access to the appropriate CJA Form 31 voucher, bills from any investigative, expert or paralegal service shall be sent to the CJA Administrator with all supporting documentation. The CJA Administrator manually will prepare a CJA Form 31 voucher and return it for the service provider's and counsel's signatures. Whether received from the CJA Administrator or obtained independently, the completed and signed CJA Form 31 voucher shall be transmitted to the CJA Administrator. After processing the signed voucher for payment, the approved amounts for investigative, expert or paralegal services will be inputted into the Excel file by the Court.
- f. Following each voucher approval, the updated Excel file will be e-mailed back to counsel so the vouchering process can be repeated for the ensuing months.

- 12. Under 18 U.S.C. § 3599(f), ex parte consideration of funding applications requires Petitioner to make a showing of the need for confidentiality. Since budget applications require disclosure of matters protected by the attorney-client or work-product privileges, the need for confidentiality is inherent in the budgeting process. *See* Fed. R. Civ. P. 26(b)(1) and (3). Accordingly, budget forms and supporting documentation will be filed under seal and not served on counsel for Respondent. Any ex parte court proceeding regarding funding will be reported and maintained under seal. The proposed budget should reflect the total attorney time required, including time for budget preparation, as well as the time for paralegals, investigators and experts, if applicable, and any anticipated travel or other expenses. Voucher preparation, however, is considered part of overhead and not reimbursable. The tasks outlined in the automated budget forms are listed

as a guide for counsel and are not intended to dictate what areas of investigation ought to be explored. Some tasks may not apply to a particular case and other unlisted tasks may be appropriate. Counsel should complete the forms as appropriate to the case.

13. In support of the proposed budget for each phase, counsel shall file an informative declaration(s) which explains and/or justifies the hours, tasks and expenses in each category of the proposed budget and includes any information that will assist the Court in determining the reasonableness of the budget request. The supporting documentation should be captioned and filed under seal in a complete application, including declaration, exhibits, and the completed budget form. All supporting declarations must be properly subscribed pursuant to 28 U.S.C. § 1746. Excluding Phase I, budget applications should be filed at least one week before the date set for the CMC, unless the Court sets an alternate date.
14. Counsel are expected to utilize all reasonable means to tier staff responsibilities to lower-rate personnel whenever practical, utilizing paralegals and law clerks to complete tasks for which attorney expertise is not required.
15. The Court appreciates that unanticipated events may require adjustments to an approved budget. Accordingly, the Court in some instances may grant conditional approval for certain tasks. Adjustment will be made during voucher processing, as appropriate.
16. Counsel generally will not be allowed to exceed the authorized budget during any phase without first seeking prior approval, or amendment to the budget, and explaining why additional funds are required. Failing to obtain approval to amend the budget could result in the denial of unauthorized or excessive expenditures. Accordingly, counsel should request permission to file any substantive pleading not anticipated in the budget, and should submit any request for

amendment far enough in advance to provide the Court an adequate opportunity to consider and rule on the request without impeding the progress of the litigation.

17. The budget for each phase will be closed out when the work for that phase is completed. Hours and expenditures will not be carried over to the next phase. Rather, a new budget for each succeeding phase must be prepared by counsel and approved by the Court. As the case progresses through each case management phase, counsel are responsible for ensuring that the case is litigated within the established budget.

APPROVED COMPENSATION

18. Work inherently necessary to practice and remain current in the area of federal habeas law, which is not directly attributable to a particular case, including the review and analysis of new cases, is considered general overhead, and is not reimbursable.
19. The Court will not approve compensation for administrative services, such as secretarial services, preparation of payment vouchers, or communications with Court staff.
20. While the Court recognizes that communication between counsel and among service providers is necessary to coordinate activities and investigation, consult on the law, and prepare and revise drafts, budgeting and billing for time in the “Consult with Co-Counsel” category is discontinued. Rather, time requested and authorized for substantive tasks, such as consulting with the client, interviewing witnesses, consulting with experts and investigators, reviewing/assembling records or evidence, and legal research and writing, *shall include* co-counsel conferences. For example, a conference at which the attorneys discuss the editing of each other’s briefs may be authorized and billed to the appropriate legal research and writing category on the Excel forms. The “Consult with Resource Counsel” category remains a viable billing category, where applicable and utilized to obtain resource information.

21. Unless a contrary need is demonstrated, the Court will compensate only one attorney for physical attendance at CMCs and other court hearings. Upon sufficient justification, the Court may authorize compensation for up to two members of counsel's legal staff at a time for visits to Petitioner and witness interviews.
22. The Court will not approve compensation for work performed on appellate proceedings (whether from interlocutory orders or final judgments). Counsel are to seek compensation for work performed at the appellate level from the Court of Appeals after having obtained an appointment from that court.
23. The Court will compensate counsel for professional time spent in airport (or other common carrier) terminals and as a passenger on common carriers only when counsel is performing substantive tasks on the case that can be billed to a professional time category. Terminal processing time as well as driving time will be compensated at the maximum rate of \$100 per hour. Although counsel may be compensated for legal work at a rate commensurate with his or her substantial experience and skill in federal capital habeas corpus proceedings, legal acumen is not being utilized for driving a car or waiting to board an airplane. The Court recognizes that when counsel is required to travel for a case and accept the lower reimbursement rate or no reimbursement, s/he could be working on another case at the maximum rate. In light of the public service nature of CJA appointments together with the fact that public rather than private funds are being utilized, the travel reimbursement set forth in this paragraph will be applied.²

² Though civil attorneys receive full compensation for litigation-related travel, parity does not exist in the context of CJA expenditures. Courts consistently have determined that a "fair" fee under the CJA does not mean the compensation must be "full." *United States v. Johnson*, 214 F. Supp. 2d 488, 491 (E.D. Penn. 2002). This follows because "a substantial element of appointed counsel's representation under the act [CJA] remains public service." *United States v. Carnevale*, 624 F. Supp. 381, 384 (D.R.I. 1985). "The purpose of the Act is not to compensate counsel with

APPROVED EXPENSES

24. The Court will authorize payment for miscellaneous expenses reasonably incurred and subject to national and district policies. Reimbursement approval requires submission of all bills and receipts.
25. Mileage for case-related travel by privately owned (not rented) automobile may be claimed at a rate in effect for federal judicial employees. An automated calculator is included on the Expenses Excel form with relevant mileage rates. Case-related parking fees and bridge/road tolls also are reimbursable. Counsel should assess whether case-related travel would be more cost effective by privately owned automobile or rented automobile.
26. Ground transportation other than by privately owned automobile will be reimbursed on an actual expense basis. Counsel should make every effort to obtain the lowest possible fares or rates.
27. Though travel expenses may be authorized in the budget, if a member of Petitioner's litigation team intends to travel by air and have the Court pay the fare directly, a Travel Request and Authorization Form must be authorized by the CJA Administrator and approved by the Court. Approval of a travel authorization form is the procedure by which government rates for travel are obtained; the form does not function as approval of travel expenses in excess of the budget. Counsel are expected to request authorization for air travel through the CJA Administrator in sufficient time to obtain low cost advance fare for air travel or to provide justification why an advance fare could not be obtained.

fees rivaling those available to attorneys representing nonindigent clients.” *In re Smith*, 586 F.3d 1169, 1175 (9th Cir. 2009).

28. Counsel are encouraged to procure more economical travel arrangements on his or her own. In that event, counsel will seek reimbursement on a CJA voucher and reimbursement will be limited to the available government rates. Counsel are directed to provide a statement of the applicable government rate when requesting reimbursement for air travel.
29. The Court will approve reimbursement for actual food and lodging expenses for out of town travel on case-related business, subject to the maximum established area per diem rate. Current travel and subsistence allowances are available on the GSA website, www.gsa.gov, under Per Diem rates.
30. Counsel will be reimbursed for the actual cost of case-related long-distance telephone calls. The Court will not authorize payment for any surcharges or for general telephone service. Facsimile transmissions are reimbursable for the actual amount of the telephone charge.
31. Counsel will be reimbursed for the actual out-of-pocket expenses incurred in photocopying, up to a maximum of 10 cents per page. Counsel will be expected to send documents over 100 pages in length to an outside copying service, unless counsel's in-house photocopying is more economically efficient.
32. The Court will authorize reimbursement for the actual cost of case-related regular U.S. postage. The Court will approve reimbursement for the actual cost of other postal services or the use of non-federal carriers (such as overnight or two-day delivery) only if circumstances require the use of such services. If counsel utilize expedited delivery services, a statement detailing the necessity of such delivery must be submitted with the itemized bill. Counsel are to make every effort to use regular U.S. mail and e-mail via the Internet whenever possible.
33. The Court will not reimburse counsel for the following expenditures:
- a. General office overhead; including cellular telephone maintenance fees;

- b. Books or other publications;
- c. Flat-fee computer research plans;
- d. General law office supplies and equipment;
- e. Travel, attendance, registration, or material costs related to educational seminars.

ANCILLARY SERVICE PROVIDERS

34. Requests for investigative and/or expert assistance should be detailed and present the factual basis to support the request. Prior to approval, the Court must find that the requested expert or investigative assistance is “reasonably necessary for the representation of the defendant.” 18 U.S.C. § 3599(f). Information which should be included in the supporting declaration to assist the Court includes, but is not limited to, a specification of: (1) the evidence sought to be uncovered; (2) facts suggesting that such investigation, expert service, or other assistance is warranted ; (3) whether the evidence existed at the time of the state trial; (4) the purpose of the evidence on federal habeas, that is, the connection of the evidence sought to be uncovered to a prospective claim or contention that will be raised in the federal petition; and (5) the proposed billing rate and the reasonableness of the rate. Presumptive rates contained in the Ninth Circuit Capital Habeas Costs Policy will apply to all ancillary service providers.
35. Counsel should provide the Court with the curriculum vitae of any ancillary service provider counsel proposes be retained. Hiring service providers who work in the geographic area where the work is to be performed should be considered to determine if the cost savings outweigh the factors favoring a single provider. For instance, if the task is interviewing members of Petitioner’s family regarding mitigating evidence, an investigator who works in the city or region in which the majority of Petitioner’s family resides might be retained. Any investigators retained to interview witnesses should avoid unnecessary expense by conducting interviews by

telephone, if possible, and otherwise taking all reasonable steps to locate the interviewees before initiating any travel.

36. If the assistance of mental health experts, including mitigation specialists, is sought, counsel must disclose in the supporting declaration the services performed by, and summarize the findings of, previous mental health experts utilized in any capacity in the case, whether at the state or federal level. If the assistance of more than one mental health professional is proposed, counsel should make clear the tasks each expert is to complete, and how his or her work is distinguishable from that of prior and/or concurrent requested experts.
37. Mitigation specialists are specialized mitigation investigators who have become integral members of capital habeas corpus litigation teams. A major responsibility of the mitigation specialist is to determine the presence of signs of mental retardation and other mental or psychological impairments. The mitigation specialist identifies relevant issues by preparing a comprehensive social history summary based on life history records and interviews with the petitioner and those who played a significant role in or are intimately familiar with the petitioner's life. While a mitigation specialist's qualifications vary, they include the ability to recognize congenital, mental, and neurological conditions and to understand how these conditions affected the petitioner's life. The mitigation specialist is distinguished from a testifying mitigation expert.
38. A testifying mitigation expert is an individual with specialized mental health experience and education who generally is qualified to diagnose mental illness. This expert is qualified to testify on the genetic, biological or environmental factors that have influenced the petitioner's life. While a testifying mitigation expert usually is a psychologist, in some cases a psychiatrist, neurologist, or other mental health professional may be retained. A testifying mitigation expert

interprets the detailed social history summary to assist the court in understanding the mitigation evidence.

VOUCHER PROCEDURES

39. All vouchers are reviewed for reasonableness. Fees or expenses which exceed the authorized budget or the limits set forth in this Guide are subject to reduction without further notice or explanation.
40. Counsel are directed to submit vouchers covering services from the commencement to the completion of each budgeted phase, on a monthly basis. Generally, vouchers should extend from the first to the last day of each month, except when combined attorney's fees and expenses total less than \$1,000 for any given month. In that event, the fees and expenses for that month may be combined with the fees and expenses incurred the following month. If a budgeted phase commences mid-month, the voucher may extend to the end of the following month. If the budgeted phase is completed mid-month, the voucher will extend to that date. All vouchers are to be submitted within the first ten days of the month following the last day of service reported. All fees and expenses for a particular time period should be submitted on the same voucher (e.g., travel and administrative expenses).
41. The Court expects counsel to submit vouchers within 90-days of the services provided, absent prior arrangements made with the Court for a later submission. Without prior Court approval, vouchers will not be processed for services rendered more than one-year prior to the date of submission of the voucher.
42. Billing statements or voucher worksheets shall specifically describe the work performed, the time allotted to each specific task, reported to one-tenth (.1) of an hour. Descriptions should not be vague or general. Each time entry shall reflect discrete, individual tasks and shall not simply

list multiple tasks performed in a specified block of time. Information should be provided in sufficient detail so as to permit meaningful review, including: identification of individual witnesses interviewed; identification, by name or title, of persons involved in telephone conversations or conferences; specific topics researched; and identification of pleadings drafted or reviewed.

43. Should the need arise, informal written request may be made to transfer attorney hours and expenses from one task to another, and/or between appointed counsel. If appropriate, the Court will approve such transfers. Ordinarily, budgeted amounts may not be transferred between or among experts and investigators. Reasonable requests, however, will be considered.
44. In the event transcripts of in-court hearings, including evidentiary hearings, are requested by Petitioner, Petitioner's counsel should arrange with the court reporter(s) to bill the Court directly through the use of a CJA Form 24. Counsel shall not include the cost of transcripts as an out-of-pocket expense on a CJA Form 30.
45. Services provided by counsel's non-attorney employees may be listed as an expense on counsel's CJA Form 30. *See* ¶ 11c, *supra*. Independent contractor paralegal services, like investigator and expert services, should be billed on a CJA Form 31. *See* ¶ 11e, *supra*.

CASE MANAGEMENT PHASES

Phase I – Appointment, Record Review, and Preliminary Investigation

46. Phase I encompasses case proceedings from the appointment of CJA counsel through organization of available records, including preliminary investigation and, if appropriate, a mental state evaluation concerning Petitioner's competence to proceed with federal litigation. The preliminary mental state evaluation also will inform the budgeting of later, more in-depth mental state issue development in Phase II. Because counsel new to the case will need to review

a good portion of the record and prior attorney files before establishing a litigation strategy, the Court anticipates that the Phase I budget be limited. Some, if not many tasks identified to be completed in Phase I may well continue into Phase II. If Petitioner's counsel are familiar with the case (as in the event one or more appointed counsel are continuing from state post-conviction proceedings), Phase I could include additional tasks before the case proceeds to Phase II.

47. The Supreme Court's ruling that the reasonableness of a state court decision "is limited to the record that was before the state court," in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1833 (2011), will inform the breadth and depth of pre-petition investigation in Phases I and II of the litigation, as well as the disposition of motions for further evidentiary development in Phase III. With the emphasis of habeas review on the state court record, even in the case where a claim is technically exhausted under *Vasquez v. Hillery*, 474 U.S. 254 (1986),³ pre-petition investigation for the purpose of fact development may be authorized where additional factual bases exist (or Petitioner alleges they can be developed) which will augment the claim, such that it will rise to the level of a prima facie case before the California Supreme Court. To the extent that a prima facie case before the California Supreme Court requires evidentiary proof to support factual allegations, however, the Court will limit funding to the development of a *colorable claim* under federal habeas corpus principles. In order to determine whether funding should be authorized to develop an unexhausted claim or augment a partially exhausted claim, Petitioner's counsel will be directed to highlight the claims in the state petition from which the proposed claims in the federal petition are derived and explain how further fact development will render that claim

³ That is, the legal theory and basic facts have been presented to the state court, and the state court found the claim did not state a prima facie case.

colorable under federal law. Once that task is undertaken, the evaluation of a pre-petition investigation funding request will be further informed by the following factors:

- a. A description of the evidence sought to be uncovered.
- b. The efforts previously undertaken to develop the evidence sought and the reason(s) those efforts were unsuccessful.
- c. Reasonable assurance by counsel that the investigation, expert service, or other ancillary assistance will be efficacious in uncovering the evidence sought.
- d. Whether the evidence sought existed and was reasonably accessible at the time of the trial.
- e. The connection of the evidence sought to be a prospective claim that will be raised in the federal petition.

48. Prior to the first CMC, Petitioner's counsel will be directed to submit a budget estimating the time needed for record assembly, initial record review, contacts with Petitioner, preliminary investigative tasks, and if appropriate an initial, preliminary mental state evaluation. Depending upon how familiar counsel are with the case, and subject to the limitations outlined above in ¶ 47, counsel may have enough direction to interview and/or retain a mitigation specialist. *See* ¶ 37, *supra*. The budget should include all tasks to be completed during Phase I, including the time spent on tasks completed or partially performed prior to submission of the proposed budget. Counsel for both parties shall complete, to the extent possible, the Confidential Case Evaluation Form, (*see* Appendix B), and directed to file it under seal prior to the initial CMC.
49. The Phase I CMC provides an opportunity to make a preliminary evaluation of case complexity, determine how much time will be needed to assemble the case record, and set a date for

Respondent to lodge the state record. *See* Local Rule 191(h)(1). Counsel for both Petitioner and Respondent are present at this and all CMCs. The Court may require counsel for Respondent to provide any missing portions of the state record to Petitioner's counsel. The Court also may issue a subpoena duces tecum requiring prior counsel to supply case files to Petitioner's counsel. Counsel should notify the Court of any delays in receiving prior counsel's files. The parties also will discuss the scheduling of a Phase II CMC to set the timetable and deadlines for filing the comprehensive petition, answer, and traverse.

50. Once case management issues are resolved, counsel for Respondent will be excused from the CMC so the Court can discuss budgeting procedures with Petitioner's counsel on an ex parte basis.
51. After the CMC, the Court will issue two case management orders, one filed publicly, addressed to all parties, setting forth significant dates and establishing schedules, and one filed under seal, addressed only to Petitioner's counsel, regarding budgeting issues. The publicly filed order will include the date upon which the statute of limitations expires, a due date for Respondent to lodge the state record with the Court, the date for the culmination of Phase I, and the date of the Phase II CMC, as well as any other matters or decisions made at the conference. The sealed order will memorialize discussions entertained during the confidential portion of the CMC, explain approval of the Phase I budget plan, and set a due date for submitting the proposed Phase II budget.

Phase II - Preparation of the Petition, Answer, and Traverse.

52. In Phase II Petitioner's counsel will complete review of the record, consult with experts and investigators, and draft a comprehensive habeas petition. The petition will include legal points

and authorities. A comprehensive, answer, including points and authorities, as well as a traverse also will be filed during this phase. Counsel for both parties will be present at the Phase II CMC to discuss the litigation timetable and set deadlines for filing the petition, answer, and traverse. If Petitioner plans to file a protective petition pursuant to *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), pursue equitable tolling, or file a state exhaustion petition concurrently with the federal petition, these intentions will be discussed at the Phase II CMC.

53. The Court anticipates the possibility that, Petitioner's federal petition may allege unexhausted claims that were not included in the petition, or are augmented so as to state a colorable federal claim for relief before the California Supreme Court. If Petitioner, concurrent with the filing of the federal petition, files a state petition before the California Supreme Court that includes all new and expanded previously unexhausted or augmented claims within the federal limitations period, and shows in a motion presented to the Court that s/he can meet the three-part test of *Rhines v. Weber*, 544 U.S. 269, 276 (2005), abeyance of federal proceedings will be considered by the Court. If abeyance is ordered under these circumstances, the filing of the answer by Respondent will be deferred until exhaustion proceedings are complete.
54. If Petitioner does not file a state exhaustion petition concurrently with filing the federal petition, Respondent shall file an answer within the time frame established by the Court. The answer shall address the allegations in the petition, consistent with Rule 5 of the Rules governing § 2254 Cases (hereafter the "§ 2254 Rules"), meaning it should respond the allegations of the petition and frame the issues in dispute. *See Williams v. Calderon*, 52 F.3d 1465, 1483 (9th Cir. 1995). The answer shall include legal points and authorities, and in addition allege all substantive and

procedural affirmative defenses Respondent intends to pursue.⁴ The timing of the comprehensive answer will take into account that it will include points and authorities. Within a reasonable time after the filing of the answer, Petitioner shall file a traverse responding to the Respondent's allegations and legal authority. The Court thereafter will take up the matters of exhaustion and statute of limitations issues, as briefed by the parties. Phase II will close when the Court resolves the parties' respective contentions regarding exhaustion and state of limitations compliance. Concurrent with the issuance of that order, the Court will set a date for the Phase III CMC. If the Court determines certain claims in the petition are not exhausted, the necessity of abeyance will be considered.

55. Should the federal petition be found to be partially unexhausted, abeyance of federal proceedings may be available under *Rhines v. Weber, supra*, in which case Petitioner's mixed petition will be held in abeyance, or under the *Kelly* procedure,⁵ in which case Petitioner must withdraw unexhausted claims from the federal petition while pursuing state exhaustion. *See King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir. 2009). Petitioners are admonished that under *Mayle v. Felix*, 545 U.S. 644, 662-64 (2005), when the withdrawn claims are re-alleged in an amended petition they

⁴ In rare cases, where a petition presents an obvious or other facial defect, the Court may be persuaded to permit Respondent to file a responsive pleading in the form of a motion to dismiss consistent with Rule 4 of the § 2254 Rules. Respondent is advised that the issue of procedural default will not be considered at this juncture. Permission to file a motion in lieu of an answer must be secured.

⁵ The *Kelly* procedure is so-called after the decision in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003).

may be barred by the statute of limitations if they do not relate back within the narrow definition of that case.⁶

56. If the federal proceedings are held in abeyance, whether ordered when the state petition is filed concurrently with the federal petition, or after exhaustion is litigated, Petitioner's counsel will be directed to file brief status reports on the progress of the case in state court on a quarterly basis. Counsel will be paid for the small amount of time this task requires. Unless otherwise directed, the Court expects that no other fees or expenses will be incurred while a case is held in abeyance. Counsel are to seek funds from the state court for fees and expenses incurred during this period.
57. Once an amended petition is found to be appropriately before the Court, or where the federal petition does not require amendment (because it was held in abeyance under *Rhines*), that petition will be considered the operative petition. Unless an answer previously has been filed to the operative petition, Respondent will file an answer and Petitioner will file a traverse, as described in ¶ 54, *supra*. The Court will then establish due dates for filing the Phase III budget as well as scheduling the Phase III CMC.
58. Once discussion of the case management aspects of the CMC are completed, counsel for Respondent will be excused and discussion about the proposed amended budget will be entertained. As with the orders following the Phase I CMC, two orders will be filed following

⁶ Upon return to federal court after exhaustion, should Petitioner choose to amend the petition, s/he shall file a memorandum of points and authorities which identifies the new claims as well as justification for the inclusion of these claims under *Mayle v. Felix, supra*. Respondent shall submit a responsive points and authorities. The Court will conduct further proceedings as appropriate for the case.

the Phase II CMC. The publicly filed order will set out the due dates and timetables for the various tasks discussed during the CMC. The sealed order will address budgeting issues.

Phase III: Fact Development Discovery, and Request for Evidentiary Hearing

59. At the Phase III CMC, the Court will address Petitioner's anticipated preparation of a motion or motions for further factual development (that is, discovery, evidentiary hearing and record expansion).
60. The Court anticipates that in some cases, Petitioners may wish to conduct discovery or request record expansion in advance of presenting a motion for evidentiary hearing. These intentions can be discussed during the CMC. Petitioner's counsel are encouraged to discuss at the CMC any discovery identified in the course of preparing the petition. Since a significant number of discovery issues can be resolved informally by the parties, discovery identified in the budget application ultimately may require less time to complete than originally contemplated. As mentioned above, the Court's approval of a contingent budget item may go unutilized if the contingency fails to materialize. *See* ¶ 15, *supra*.
61. When preparing a request for an evidentiary hearing, Petitioner's counsel should be mindful that the request shall not recite any legal authority on the merits of the claims, but be limited to identification of: (a) the claims for which a hearing is sought; (b) an offer of proof as to the evidence sought to be presented; (c) identification of the state court version of each federal claim denied by the California Supreme Court and (d) the reason(s) Petitioner did not present the evidence sought to be developed in state proceedings. *See Pinholster*, 563 U.S. ___, ___, 131 S. Ct. at 1398, 1401; 28 U.S.C. § 2254(e)(2). The budget for Petitioner's evidentiary hearing motion should include preparation of a reply brief.

62. If during the litigation of Phase III, the parties wish to involve the Court in resolution of any case management disputes, or if a modification of the case management plan appears necessary, further CMCs may be requested.
63. Phase III of the litigation is complete when the Court issues an order addressing Petitioner's motion for further evidentiary development. If there are multiple motions for evidentiary development, Phase III will be complete when the last motion is resolved. If a motion for further evidentiary development is granted, the Court will schedule the next CMC and direct Petitioner's counsel to file a budget application for Phase IV.
64. In the event the Court denies Petitioner's motion for further evidentiary development and denies the merits of all record-based claims as well, the Court will issue or deny a certificate of appealability (COA) concurrently with the final order. Rule 11 of the § 2254 Rules. The issuance of a COA indicates Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Entry of judgment will follow. If Petitioner moves for reconsideration of the denial of a COA, the motion will not extend the time to appeal. In cases where resolution of the action is adverse to Petitioner at the culmination of Phase III, the Phase IV budget application will be very minimal, encompassing only a notice of appeal and limited post-judgment litigation.

Phase IV: Discovery, Evidentiary Hearing and Final Briefing

65. If further evidentiary development is authorized, Phase IV may be bifurcated and multiple CMCs may be held to determine the time and resources needed to prepare for and conduct discovery, the evidentiary hearing, and post-development briefing. These CMCs provide an

opportunity for the Court to explore remaining areas in dispute, ascertain any items of agreement, and encourage the possibility of case resolution.

66. Should case resolution fail to materialize, and in the event an evidentiary hearing is granted, the Court will consider requests for pre-evidentiary hearing discovery. Pre-hearing discovery may include deposing the opponent's experts, obtaining documents upon which expert testimony is predicated, and identifying witnesses who will testify. The matter of how testimony will be presented and how evidence will be received can be discussed at the CMC. The Court may allow some direct testimony by declaration or depositions in lieu of live testimony (subject to live cross examination).⁷ To assist in preparing the budget application for Phase IV, a date will be set for the parties to disclose the identities of witnesses expected to be deposed and/or to provide live testimony, in order to enable Petitioner's counsel to estimate the number of witnesses to be deposed on behalf of Petitioner and the number of Respondent's depositions at which attendance will be required.
67. Certain expenses incurred in connection with depositions of fact witnesses are paid by the U.S. Marshal for the Eastern District of California, and as such are not part of the budget. First, the Marshal pays expenses associated with fact witnesses deposed by Petitioner (whether or not by subpoena), including witness fees and travel expenses, the court reporter's fees, and cost of the original transcript. Second, for depositions of fact witnesses conducted by Respondent, the Marshal pays costs associated with Petitioner's copy of the deposition transcript. *See* 28 U.S.C. § 1825(b); Guide to Judiciary Policy, Volume 7, § 3.20.40.20. Under Rule 6(c) of the § 2254 Rules, for fact witness depositions noticed by Respondent, the Court may additionally require

⁷ Live testimony is preferred for experts and key percipient witnesses.

the State of California to pay travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. *See also* Guide to Judiciary Policy, Volume 7, § 3.20.40.30. Witness fees, travel expenses, reporter's fees, and cost of original transcripts for fact witness depositions noticed by Respondent must be paid by the State of California. The State of California also pays for Respondent's transcript copy of a fact witness deposition noticed by Petitioner.

68. Depositions of expert witnesses generally are the responsibility of the party noticing the deposition. Under F.R.C.P. 26(b)(4)(C), the party seeking discovery concerning the opponent's expert witness shall pay that expert's reasonable fee in responding to the discovery. Thus, court reporter fees and expenses together with fees and expenses of Respondent's experts deposed by Petitioner are paid out of CJA funds, and must be included in the budget. By the same token, court reporter fees and expenses together with fees and expenses of Petitioner's experts deposed by Respondent must be paid by the State of California. In addition, under Rule 6(c) of the § 2254 Rules, for expert witness depositions noticed by Respondent, the Court may require the State of California to pay the travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. Petitioner's copy of the deposition transcript is paid out of CJA funds, and should be included in the budget. *See also*, Guide to Judiciary Policy, Volume 7, § 3.20.40.30.
69. A number of expenses associated with oral testimony at evidentiary hearings also are not part of the budget. The U.S. Marshal pays for fees and travel expenses of fact witnesses called by subpoena to testify at the evidentiary hearing. *See* 28 U.S.C. § 1825(b). The State of California must pay the court reporter for Respondent's copy of the transcript. The budget should include

fees and travel expenses for any expert witness Petitioner intends to call to testify at an evidentiary hearing. (Fees for the actual transcript are paid in the same manner as all in-court hearings, with the court reporter submitting transcript expenses on a CJA Form 24. *See* ¶ 44.) Reimbursement of costs for depositions in lieu of live testimony at an evidentiary hearing *may be* made according to the same policies as at an evidentiary hearing.

70. In light of the aforementioned provisions, the Court will consider apportionment of discovery costs between Petitioner and Respondent in the budget. The Court also will determine whether any experts who testified at the state court trial should be considered fact witnesses and, if so, order that travel and other expenses be paid by the U.S. Marshal pursuant to 28 U.S.C. § 1825(b), and not included in Petitioner's budget. Because the budget order is a confidential document, the Court will issue a companion order served on both parties indicating any resolutions as to the apportionment of costs.
71. After further evidentiary development has been completed, the Court will determine the amount of time and resources needed for post-development briefing, and set deadlines accordingly. A separate CMC may be required to accomplish this. After review of the pleadings, briefing, the state record, all properly admitted evidence, and the argument of the parties, the Court will issue a memorandum order and decision on the merits of the petition. Entry of judgment will follow.⁸
72. In the event the Court enters its final order adverse to Petitioner, it will issue or deny a COA. Rule 11 of the Rules Governing § 2254 Cases. The issuance of a COA indicates Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). If

⁸ Only upon extremely rare circumstances will the Court consider entertaining a motion or request for reconsideration. Such motions are not favored.

Petitioner moves for reconsideration of the denial of a COA, the motion will not extend the time to appeal.

CLEMENCY PROCEEDINGS

73. In the event all habeas relief is denied before the District Court and Petitioner's appeals to the Ninth Circuit and the United States Supreme Court are unsuccessful, clemency proceedings are anticipated. While a new appointment for clemency representation is not necessary for continuing counsel, a new appointment will be considered if continuing representation is unavailable. Guide to Judiciary Policy, Volume 7, § 680.10.
74. Once all appeals are exhausted, Petitioner's counsel shall notify the Court so that a CMC may be scheduled for budgeting purposes. *See id.*, § 680.30. Respondent will not participate in the clemency budgeting process. Due to time constraints inherent in the clemency process, the Court anticipates that the clemency budget will be presented as an overview, with more attention to the time-frame than to the specific tasks. Petitioner is directed to submit the clemency budget in declaration format over the signature of CJA counsel. In all cases, the Court anticipates that clemency counsel will first seek funds from the California Supreme Court. All budgeting and vouchering procedures set forth in this Guide shall apply to the clemency budget.

CONCLUSION

75. This Guide should serve to assist Petitioner's and Respondent's counsel in managing capital habeas cases while allowing control of associated case costs. Within the basic framework of the budgeting process, creative and individual approaches to case management are encouraged. Ideas for effective case management are welcomed and should be communicated to the Court.

Appendix A

RATE JUSTIFICATION WORKSHEET

A. Attorney Name and Address: _____

B. Experience and Qualifications:

Admitted to practice: _____ years.

Member of the bar of a federal district court or court of appeals: _____ years.

Primary area of practice: _____

Has previously represented a client in (check all that apply):

- ☐ Direct appeal of a death sentence
- ☐ State capital post-conviction proceeding
- ☐ Direct appeal of a non-capital homicide conviction
- ☐ Capital trial
- ☐ Non-capital homicide trial
- ☐ Other felony trial
- ☐ Non-capital federal habeas corpus
- ☐ Federal capital habeas proceeding

Number of clients previously represented in federal habeas actions: _____

Most recently authorized hourly rate in such a case: _____

Approximate hours spent in training programs on death penalty litigation and/or post-conviction representation: _____

C. Other Relevant Information:

Appendix B

CONFIDENTIAL CASE EVALUATION FORM

The answers on this form are for case management and budgeting purposes only and will not be binding in any respect on substantive issues to be raised in the course of litigation.

NAME OF ATTORNEY(S):

Lead Counsel:

Co-Counsel:

STATE LEVEL PROCEEDINGS

1. Did either lawyer participate in any part of Petitioner's state proceedings?

☐ No -- proceed to question 2. ☐ Yes (indicate which lawyer) _____

If yes, in what aspects of the case?

2. Was a state habeas petition involving the same conviction and sentence filed?

☐ No ☐ Yes

If yes: Date filed: _____

Disposition &
Date: _____

3. Was investigation performed at the state level?

☐ Yes ☐ No

If yes, what was the purpose?

4. Were funds requested at the state level for post-conviction investigation?

☐ No - Reason:

☐ Yes

<u>Purpose</u>	<u>Amount Requested</u>	<u>Amount Authorized</u>
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5. Was discovery requested at the state level?

☐ No - Reason:

☐ Yes

<u>Nature of Discovery Requested</u>	<u>Was it: Granted? Denied?</u>
--------------------------------------	-------------------------------------

6. Was an evidentiary hearing held at the state level?

☐ Yes

☐ No

STATUTE OF LIMITATIONS

Based on current information, what is the date required
by the statute of limitations for filing of the petition? _____

THE RECORD

1. Has the record been assembled?

☐ Yes ☐ No: Missing portion(s) and
location? _____

2. Have the complete files of prior counsel been obtained?

☐ Yes ☐ No: Missing portion(s) and
location? _____

3. As accurately as possible (recognizing that it may be an estimate at this point),
provide information about the size of the record:

<u>Type of Record</u>	<u>No. of Pages</u>
Trial transcript & Exhibits	_____
State appellate record	_____
State habeas record & Exhibits (including transcript from any state evidentiary hearing)	_____
Ancillary files and records (including prior counsel's files, investigative reports, etc.)	_____
Total Pages	=====

FACTORS AFFECTING CASE COMPLEXITY

Check all the factors applicable to this case and provide information that will allow determination of whether the case may be especially complex or costly:

☐ Age of Petitioner at time of offense: _____

☐ Co-defendants (specify if tried jointly or separately).

Number: _____

☐ Number of victims: _____

☐ Related cases.

Summarize:

☐ Prior convictions.

Number and type:

☐ Elapsed time since offense: _____

☐ Elapsed time since trial: _____

☐ Informant involved

Number, type and availability of informant(s):

☐ Serial homicides

Number of different events at separate locations:

☐ Number of death eligibility circumstances alleged: _____
List:

☐ Other crimes charged
List:

☐ Unadjudicated criminal conduct
Type:

☐ Unadjudicated bad acts
Type and Petitioner's age at commission:

☐ Petitioner spent an extended time out of the state or country
Location:

☐ Petitioner's family presently out of the state or country
Location:

☐ Witnesses or other investigation that will require travel
Provide specifics, including number of witnesses, locations, and number of trips anticipated:

☐ Petitioner's and/or family's background records were not obtained in state proceedings.

- ☐ There are issues as to competency/mental illness/or other disabilities.
Explain impact on legal issues:

Explain impact on client relations:

- ☐ Use of drugs or alcohol at time of offense.
- ☐ Petitioner suffered physical/mental abuse as a child.
- ☐ Translator required for Petitioner.
- ☐ Translator required for witnesses.
Number of witness and types:

- ☐ Scientific procedures will be required.
Type:

- ☐ No investigation was performed or was denied at the state level.
- ☐ No evidentiary hearing was conducted at the state level.
- ☐ Other issues - Describe: